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CURRENT TOPICS.

The devices to evade the usury laws are well nigh innumerable, as will always be the case with a law which any considerable portion of the community believe to be an unwarranted intrusion upon the domain of private rights, whether, in fact, it be so or not. The recent case of Herrick v. Dean, decided by the Supreme Court of Vermont, is an illustration of this principle. It would seem from the facts in that case, that the fact that it had been decided that a release under seal, by the borrower of all claims and demands against the lender, would operate as a bar to the recovery of usury, it suggested to some acute Shylock that the taint of usury in a transaction might be avoided by having the unfortunate debtor execute such a release before the loan was made. Such was the device resorted to in the above case, where Herrick executed to Dean four notes each for $1,000 and interest, and received therefor only $3,615. At the same time he executed under seal a release or receipt for $100 "in full settlement and payment for all extra or unlawful interest." Having paid the notes he brought suit to recover back the usury so paid, and the release above mentioned was pleaded in bar. The court, however, sustained the finding of the referees' in favor of the recovery by the plaintiff of $385 and interest, on the ground that the release, to be effective, must be free from the element of pressure. Said Rowell, J.: "The transaction resorted to in this case was a mere subterfuge to evade and set at naught the Statute of Usury. * * * * The statute was intended for the protection of the weak against the strong, the borrower against the lender, and public policy requires that it should not be evaded nor its force abated. This pretended release was a part of the transaction of borrowing, executed when the press of the borrower's necessity was upon him, and he at the mercy of the lender. If such a device as this is allowed to avail, resort would be had to it in all cases, and the statute thereby practically repealed. This is a very different case from releasing usury after a man's embarrassments have passed, and he has ceased to be a peculiar subject for the protection of the statute. Bosler v. Rheem, 72 Pa. St. 54.

It rarely occurs that the editorial mind can view, with any considerable degree of equanimity, the appropriation, by another, of the fruits of its labor, without extending the literary courtesy, known as "credit." For ourselves, we lay no claim to such philosophical calm; and when, to such provocation, is added the further injury of improperly attributing the borrowed matter to some other journal, which, it may be, has filched it from our columns and reprinted it without credit, we feel that a protest is in order. Our present grievance is that our transatlantic contemporary, the *Law Times* (which is printed in London and occupies a very eminent place in the ranks of legal journalism), in its issue of October 14, 1882 (p. 402), reprinted, under the heading of "Legal Extracts," an article entitled, "Books of Science as Evidence," and attributed it to a certain obscure American contemporary. The article in question, as will doubtless be recalled by our readers, appeared in the early part of this volume (at p. 88), and was an original contribution to our columns by Mr. F. R. Mechem, of Battle Creek, Mich., who has received our check in compensation. Hence we trust that our English contemporary will make the proper reparation for the wrong which it has unwittingly done us. As to the principle involved, we do not wish to be understood as objecting to the use of matter which appears in our columns, by our transatlantic neighbors. They are welcome. But in the case of our contemporaries here at home, the circumstances are different. They are addressed to the same public, to whose wants and tastes we ourselves cater, and any appropriation of the original matter in our paper which is protected by copyright, disturbs the conditions of legitimate competition in trade, and is a blow, albeit insignificant, at our prosperity. Recognizing it as such, we are determined not to tolerate the practice, which we have observed of late is of growing frequency, but, if necessary, to resort to our legal remedies to stay the hand of these trespassers.

EXCUSES FOR NON-PERFORMANCE OF CONTRACT.

How far may the breach of a contract be justified, either by the action of the contracting parties, or by extrinsic facts and circumstances, or by unforeseen contingencies? The question is equally important, whether arising in actions *ex contractu*, such as suits for damages for breach of contract, or in proceedings in equity for specific performance.

1. Acts of the Parties.—Where either contracting party dispenses with the performance of the undertaking of the other, or by his own act renders such performance impossible, such conduct is held to operate as a complete excuse and justification of the non-performance, by the other contracting party, of his agreement. The rule applies as well in cases of ordinary contracts, such as those for furnishing labor and materials, as in cases of mutual covenants conditioned upon each other, where the promise of the one party is the consideration for the undertaking of the other. Nor is the doctrine varied in cases of contracts upon condition, and the rule applies with like force, whether the condition be precedent or subsequent[1]

The rule, as stated, rests upon the salutary principle laid down in Fleming v. Gilbert:[2] "that he who prevents a thing being done, shall not avail himself of the non-performance he has occasioned." And the authorities cited show the application of the doctrine both to cases where the party not in default seeks to recover upon the contract, and where he defends against its breach.

2. Sickness or Death.—Where the contract is of a personal nature, as for personal services, or where the act to be done is one which the promisor alone is capable of doing, sickness or death of the promisor, if unforeseen, is regarded as so far the act of God as to excuse either delay or non-performance. And in such cases a recovery may be had upon a *quantum meruit*.[3]

3. Acts of third Parties, Accidents, etc.—When the performance of a contract is prevented by the conduct of third parties not privy thereto, or by accident, however unforeseen or inevitable, the obligor is not thereby relieved from his undertaking. In all such cases the distinction is drawn between obligations or duties imposed by law, and those voluntarily assumed by contract; and while in the former class of cases, the contingencies named may excuse the non-performance of the obligation, in the latter class they afford no excuse. The earliest and leading English case is Paradine v. Jane,[4] decided in the King's Bench in 1648. Plaintiff declared for rent under a lease for years. Defendant pleaded that he was expelled from the premises demised by a hostile army. Plaintiff demurred, and the plea was held insufficient, and there was judgment for plaintiff. The court held that "where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, then the law will excuse him. * * * * But when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." And this distinction will be found to underlie all the authorities.[5]

[1] Roll's Abridgment, 445; Hotham v. East India Company, 1 Term Rep. 639; Risinger v. Cheney, 2 Gilm. 90; Potter v. Dennison, 5 Gilm. 590; Rawson v. Clark, 70 Ill. 656; Mt. Vernon v. Patton, 94 Ill. 65; Borden v. Borden, 5 Mass. 67; Fleming v. Gilbert, 3 Johns. 528; Marshall v. Craig, 1 Bibb, 383; Majors v. Hickmann, 2 Bibb, 217; Shaw v. Hurd, 3 Bibb, 372; Jones v. Walker, 13 B. Mon. 165; Mayor v. Butler, 1 Barb. 337; Wheatley v. Covington, 11 Bush, 18; Smith v. Cedar Rapids, 43 Iowa, 239; Stewart v. Keteltas, 36 N. Y. 388.

[2] 3 Johns. 528.

[3] Wolfe v. Howes, 20 N. Y. 197; Ryan v. Dayton, 25 Conn. 188; Green v. Gilbert, 21 Wis. 395; Jennings v. Lyons, 39 Wis. 553; Fuller v. Brown, 11 Met. 440; Knight v. Bean, 22 Me. 531; Lakeman v. Pollard, 43 Me. 463.

[4] Aleyn, 26.

[5] The English cases are: Paradine v. Jane, Aleyn. 26; Atkinson v. Ritchie, 10 East, 530; Brecknock & A. C. N. v. Pritchard, 6 Term Rep. 750; Hadley v. Clarke, 8 Term Rep. 259; Barret v. Dutton, 4 Camp. 333; Shubrick v. Salmond, 3 Burr. 1637; Parker v. Hodgson, 3 Maul. & Sel. 265; Storer v. Gordon, Ib. 308; Blight v. Page, 3 Bos. & Pul. 295, note; Jervis v. Tomkinson, 1 Hurl. & Norm. 195; Marquis of Bute v. Thompson, 13 M. & W. 487; Bullock v. Dommitt, 6 Term Rep. 650; Comyn's Dig. Tit. Condition, L. 14. The American cases are; Cobb v. Harmon, 23 N. Y. 148; Beebe v. Johnson, 19 Wend. 500; Tompkins v. Dudley, 25 N. Y. 272; Oakley v. Morton, 1 Kern. 25; Harmony v. Bingham, 2 Kern. 99; Bunn v. Prather, 21 Ill. 217; Bacon v. Cobb, 45 Ill. 47; Steele v. Buck, 61 Ill. 343; Kitzinger v. Sanborn, 70 Ill. 146; Walker v. Tucker, Ib. 527; School District No. 1 v. Dauchy, 25 Conn. 530; School Trustees v. Bennett, 3 Dutch. 513; Adams v. Nichols, 19 Pick. 275; Davis v. Smith, 15 Mo. 467.

The extent to which the doctrine has been carried may be best shown by reference to some of the matters pleaded in justification of the breach of contract in the cases cited, such as an invasion of the country by a hostile army; the taking possession of a railway by military authority for military purposes; an armed embargo upon the landing of vessels in foreign ports; the destruction of a building by lightning, by fire, or by reason of a latent defect in the soil; the destruction of a vessel by a storm at sea, and many like cases falling under the head of inevitable accident, none of which were recognized as presenting sufficient grounds of justification for non-performance of the contract.

Some of the cases cited hold expressly that the act of God affords no excuse for the non-performance of a contract. Of this class is School District No. 1 v. Dauchy,[6] which was brought for the non-performance of a contract to build a school house, the defendant pleading the destruction of the building by lightning before its completion. The distinction underlying all the cases is well stated in the opinion, as follows: "The act of God will excuse the not doing of a thing where the law had created the duty, but never where it is created by the positive and absolute contract of the party. The reason of this distinction is obvious. The law never creates or imposes upon any one a duty to perform what God forbids, or what He renders impossible of performance; but it allows people to enter into what contracts they please, provided they do not violate the law." And to the same effect is Bunn v. Prather.[7]

Whether the failure to perform may be excused by an injunction, or other judicial process, obtained at the suit of one not privy to the contract, does not seem to have yet been passed upon by the courts. It has, however, been decided that injunctions obtained at the suit of third persons do not have the effect of suspending or extending the period of statutes of limitation.[8] No reason is perceived why the same rule should not apply in cases where performance of a contract is prevented by an injunction obtained by strangers to the contract. And if such injunctions were allowed to justify the non-performance of contract obligations, they might readily be obtained by collusion, thus opening a wide door for the repudiation of all contracts.

J. L. High.

Chicago, Ills.

6 25 Conn., 530.
7 21 Ill., 217.
8 Wilkinson v. First National Fire Ins. Co., 72 N. Y. 499; Barker v. Millard, 16 Wend. 572.

PRIVILEGE OF WITNESSES AS TO CRIMINATING QUESTIONS.

I.

"Human life," observes Sir W. Erle, "is a progress between two sets of physical and moral agencies perpetually striving against each other, the one on the side of falsehood, malice and destruction; the other on the side of truth, kindness and health; and the law, if wisely made and properly administered, maintains truth and kindness and health, and so, among other things, helps persons of honest industry to obey each his own will."[1] Of this spirit of kindness characterizing our jurisprudence one of the most striking exemplifications, wisely or not pervading every part of our system of judicial inquiry,[2] is presented by the "general rule, established with great justice and tenderness by the law of England," as Lord Hardwicke pronounced in Harrison v. Southcote,[3] conferring the privilege on a witness, agreeably to the humane principle *nemo tenetur seipsum prodere*, to refuse, whether he be a party to the litigation or not, to answer either in a court of law or equity any question, put either *viva voce* or by way of written interrogatory, the answer to which would have a tendency to expose the witness, or the husband or wife of the witness to a criminal charge, penalty or forfeiture of any kind, reasonably likely to be sued for or preferred. This rule was very anciently engrafted in the common law, while equity carried its operation still further,[4] and it is recorded that even Chief Justice Jeffries was pleased to recognize it, when it told against the prisoner. It has been declared by the Law of Evidence Amendment Act, 1851;[5] while it has been engrafted upon the Constitutions of all the American States.

1 Law of Trades' Unions, Introd.
2 Hare on Disc., 2nd ed., 100.
3 2 Ves. Sen., 389.
4 Wigram on Disc., 81; Mitford on Pleading, 194.
5 14 & 15 Vict., c. 99, s. 3.

But, obviously enough, it might be carried too far; wisely made, if not "properly administered" it might become dangerous to the last degree. "If you allowed a witness, merely on his own statement of his belief that an answer to a question would tend to criminate him, to refuse to answer, it would enable a friendly witness who wished to assist one of the parties to escape examination altogether, and to refuse to give his evidence. That must be an evil so great as far to overbear, as a question of public policy, the danger, if it is to be treated as a danger, of occasionally assisting to convict a man out of his own mouth." So said Sir G. Jessel, M. R., in the recent case of *Ex parte* Reynolds, before the Court of Appeal, which has attracted our notice by the report in last Saturday's issue of the *Justice of the Peace*;[6] and that decision in particular, taken in connection with the recent case of Temple v. Commonwealth, before the Supreme Court of Appeals of Virginia,[7] induces us to comment on this subject.

At one time, indeed, it was *vexata questio* whether a witness was bound to answer when the answer might subject him even to merely civil liabilities;[8] but it is now settled by the legislature that he can not refuse to answer in such case.[9] In cases not covered by the statute, however, the general rule is to the effect already formulated.[10] The privilege can be claimed only after the witness is sworn, and the objectionable question is put;[11] but the witness may claim protection under this rule at any stage of the examination, and, when granted, he can not be forced to proceed further in answer to such questions;[12] and, the privilege being his, and not that of the party,[13] the counsel in the case is not permitted to make the objection;[14] but it seems the judge ought to caution the witness.[15] If, having been cautioned that he is not compelled to answer the question, he answers at all, he is bound to disclose the whole of the transaction;[16] and, if he voluntarily answers questions tending to criminate him in his examination in chief, he is bound to answer on cross-examination, however penal the consequence may be.[17]

As the latter question is one on which there has been some conflict of opinion, it may be well to refer more particularly to People v. Freshour, as being the most recent decision (1880) on the subject, holding that, where an accomplice called as a witness by the State voluntarily testifies in chief on a particular subject, he may be cross-examined on that subject, even though he claims to be privileged from answering, on the ground that his answers may criminate him in other matters. The prisoner had testified that he was present at and a party to the alleged larceny, and was then asked by defendant's counsel, "state the general plan which you and the defendant entered into for stealing these cattle?" This he was excused from answering, and this was held error. M'Kinstry, J., said: "The witness should not have been permitted to separate the actual taking of the property from the plan of the parties to the taking. His recital of the alleged plan or agreement might have tended to show that the connection of defendant with the actual taking was innocent—as that he supposed the cattle to be the property of the witness, and was employed by him—or might have been led to such expansion of the narrative by witness as would leave him open to contradiction, or to impeachment by reason of the improbabilities of his story. Defendant was entitled to a full

[6] *Ex parte* Reynolds, 26 Ch. Div. 294; 46 L. T. (N. S.) 508.

[7] 5 Va. L. J., 366.

[8] 6 Cobbett's P. D., 167.

[9] 46 Geo. 3, c. 37; but see Venables v. Schweitzer, L. R. 16 Eq. 76, 42 L. J. Ch. 386.

[10] R. v. Barber, Str. 444; Cates v. Hardacre, 3 Taunt. 424; Sir J. Friend's Case, 4 St. Tr. 649, 16 Ves. Jun. 242; Title v. Grevet, 2 Lord Raym. 1088; R. v. Oates, 4 St. Tr. 9, 10; R. v. Lord George Gordon, 2 Doug. 593; Hardy's Case, 24 How. St Tr. 755; Parkhurst v. Lowten, 2 Swans. 216; R. v. Boyes, 1 B. & S. 330; R. v. Garbett, 1 Den. 236; R. v. All Saints, Worcester, 6 M. & S. 200; Parkhurst v. Lowten, 2 Swans. 214; Pye v. Butterfield, 34 L. J. Q. B. 17; 1 Stark. on Ev., 3d ed., 191; 2 Taylor on Ev., Part III., c 3; Steph. on Ev., Part III., art. 120, 2 Hawk., c. 46; Mitford's Ch. Pl. 157; and as to compelling prisoners to furnish personal evidence of their own identity, see 14 Ir. L. T. 476; and as to objecting on this ground to answer interrogatories, see Eiffe Jud. Act, 382-4-5; Wilson Jud. Act, 3d ed. 294; Hart and Elloart, Disc. 9.

[11] Boyle v. Wiseman, 10 Ex. 647.

[12] 2 T. R. 268; R. v. Garbett, 2 C. & K. 474.

[13] R. v. Kinglake, 11 Cox, 499; Ingalls v. State, 10 Cent. L. J. 317.

[14] Thomas v. Newton, M. & M. 48, n.

[15] 6 M. & S. 194; see 14 Ir. L. T., 317.

[16] Dixon v. Vale, 1 Carr. C. 278; East v. Chapman, 2 C. & P. 570, Mod. & M. C. 47; Austin v. Poiner, 1 Sim. 348. State v. Freshour, 1 Ky. L. J. 224.

[17] 1 Stark. on Ev., 3d ed. 198; State v. Harrington; 5 Cent. L. J. 154; Town v. Gaylord, 28 Conn. 309; State v. Freshour, *ubi supra*.

history of all that tended to explain the nature and degree of his complicity with the acts of the witness. The scheme of the parties and the acts following were part of one transaction; and when a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on that subject, even though his answers may criminate or disgrace him.[18] If the witness had been compelled to give his version of the agreement, it would have aided the jury in determining how far his testimony was credible. He had already testified that there were other parties to the criminal agreement, but it was neither his moral duty nor legal privilege to protect them at the expense of the defendant on trial. If, when he had given his version of the plan, he had stated there were no other parties to it than defendant and himself, he would have shown that this or his former statement was untrue; if he named other parties, they might have been called to disprove the accusation, and thus discredit the whole of his testimony. It is enough, however, to say that he had already admitted that the conspiracy contemplated and provided for the commission of the particular overt act charged in the indictment. If a witness discloses a part of a transaction with which he was criminally concerned, without claiming his privilege, he must disclose the whole.[19]

While no agreement can deprive a party of his right to refuse discovery tending to establish a criminal charge against him,[20] the privilege may be lost by the witness waiving the right to take the objection;[21] or by the liability ceasing;[22] and so, where an offense is barred by statute of limitations;[23] but it has even been held that a witness is protected although he has received a pardon.[24] In the Massachusetts case of Commonwealth v. Nichols,[25] it was held that a person accused of a crime and voluntarily testifying in his own behalf under a statute allowing him so to do, waives thereby his privilege of not being compelled to criminate himself.[26] But, the contrary has been held in other States.[27] And in Temple v. Commonwealth,[28] it was held that the fact that a witness testified before the grand jury,[29] or before a coroner;[30] and, on his evidence, an indictment was found, will not deprive him of his privilege of declining to testify on the ground that he would criminate himself, on the trial of the party so indicted on his testimony. And if the witness answers questions improperly put, his answers may afterwards be used as evidence against him; while, on the other hand, no inference as to the truth of the suggestion can be drawn from the fact that the witness declines to answer;[31] and where, under statutes enabling defendants in criminal cases to testify in their own behalf, they refuse to answer, the failure to do so can not be taken into consideration by the jury in determining whether or not they are guilty;[32] and such refusal can not be used against a witness upon his subsequent trial for the same offense.[33] But, in India the court may presume that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavorable to him.[34]

To the general rule, however, certain exceptions have been established. For instance, in furtherance of the object of the bankrupt laws, to procure a discovery and equal distribution of the assets among all the creditors, a qualification has prevailed in bankruptcy; and it is now well settled that, while a witness is entitled to the usual protection,[35] the bankrupt himself is bound to answer all questions respecting his property, be the

18 Town v. Gaylord, 28 Conn. 309.

19 10 Fost. 540.

20 Lee v. Read, 5 Beav. 381; Robinson v. Kitchen, 21 Ib. 365, 370; Hare on Disc.

21 Paxton v. Douglas, 16 Ves. 242; Corporation of Trin. House v. Burge, 2 Sim. 411; Williams v. Farrington, 3 Bro. C. C. 38, 40; Parkhurst v. Lowten, 1 Mer. 391, 400; Hambrook v. Smith, 17 Sim. 209, 215; Pye v. Butterfield, 5 B. & S. 829, 837.

22 Id.; Wigram on Disc. 83.

23 Calhoun v. Thompson, 56 Ala. 166.

24 1 Stark. on Ev., 3d ed., 192.

25 114 Mass., 285.

26 And see 101 Mass., 200.

27 Bigler v. Reyher, 43 Ind. 112; Barker v. Kuhn, 38 Iowa, 395; Bobo v. Bryson, 31 Ark. 387; Dutlenhofer v. State, 34 Ohio, 6 Rep. 726.

28 5 Va. L. J. 366.

29 See 2 Cent. L. J. 180.

30 Cullen's Case, 24 Gratt. 624; *cf.* R. v. Widdop, L. R. 2 C. C. R. 3.

31 Stockfleth v. De Tastet, 4 Camp. 10; Smith v. Beadrali, 1 Ib. 30; R. v. Merceron, 2 Stark. 366; Rose v. Blakemore, Ry. & M. 384.

32 Commonwealth v. Harlow, 110 Mass. 411; Commonwealth v. Nichols, *ubi supra;* Commonwealth v. Scott, 5 Cent. L. J. 415.

33 State v. Bailey, 20 Am. L. Reg. 552.

34 Ind. Ev. Act, s. 114, Illust. (A); see also s. 148 (4).

35 *Re* Firth, *Ex parte* Schofield, 5 Ch. Div. 230; s. c., 46 L. J. Ba. 112; s. c., 36 L. T. (N. S.) 281

consequences what they may, with this exception that he can not be required to answer a question whether he has done some specific act clearly of a criminal nature;[36] but, he can not, when examined touching his estate, trade or dealings, refuse to give any information respecting them, merely because such information may incidentally show that he has been guilty of some crime or misdemeanor;[37] and his examination may be used as evidence against him on a criminal charge;[38] and, as a general rule, all depositions on oath legally taken are evidence against a witness on a subsequent criminal charge, especially if he had not objected to them as criminatory.[39] As to husbands and wives:[40] "These cases show that even under the old law, which made the parties and their husbands and wives incompetent witnesses, a wife was not incompetent to prove matters which might tend to criminate her husband. R. v. Cliviger assumes that she was, and was to that extent overruled. The cases, however, do not decide that if the wife claimed the privilege of not answering, she would be compelled to do so, and to some extent they suggest that she would not."[41] And see Starkie's Evidence;[42] and also Powell on Evidence,[43] where it is observed: "The question whether a wife is bound to answer questions criminating her husband is not in a satisfactory state." In equity, however, there is no doubt that a wife can not be compelled to answer any question which may expose her husband to a charge of felony;[44] but as to high treason, see R. v. Griggs.[45] And as to "communications" between husband and wife during marriage, or when it is terminated by death or divorce, disclosure is not compellable.[46] And in reference to the Married Women's Property Act, 1870, it has been said: "It is conceived that there is nothing in the statute to vary the rule by which communications between husband and wife, made during marriage, are held privileged and inadmissible in evidence, such privilege being based on general grounds of public policy.[47] For to admit such evidence would occasion domestic dissension and discord; it would compel a violation of that confidence which ought, from the nature of the relation, to be regarded as sacred; and it would be arming each of the parties with the means of offense, which might be used for very dangerous purposes;[48] and so, even though upon consent.[49] But the married Women's Property Act, 1882,[50] coming into operation on the 1st day of January next (repealing the former acts), introduces an important alteration; for by section 12, giving to married women a right to the same civil and criminal remedies in respect of separate property as if they were unmarried, it is provided that "in any proceeding under this section, a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding;" and see s. 16 as to the criminal liability of wives in reference to the property of their husbands.

The *cause celebre* of United State States v. Guiteau, is the most recent case on the subject of privilege as regards confidential communications between husband and wife, which came under consideration from a novel point of view, so that the judgment[51] is the more worth quoting from. Said James, J., on the appeal to the Supreme Court of Columbia: "Mrs. Dunmire, who was married to the defendant in July, 1869, and was his wife for four years, but had been divorced from him, was asked the following question: 'I will ask you to state to the jury whether, in your association with him (the defendant), you ever saw anything that would indicate that he was

[36] *Ex parte* Cossens, Buck, 540; *Ex parte* Kirby, M. & M. 225; *Ex parte* Heath, 2 D. & C. 214; Mont. & Bl. 184; *Re* Feaks, Ib. 226; *Re* Smith, Ib. 230; *Ex parte* Pratt, 1 G. & J. 62.

[37] Ib.

[38] R. v. Scott, 1 D. & B. 47, 2 Jur. N. S. 1096; R. v. Sloggett, 1 Dear. 656; 2 Jur. N. S. 476; R. v. Skeen, 1 Bell C. C. R. 97; 5 Jur. N. S. 151; R. v. Robinson, L. R. 1 C. C. R. 80; 36 L. J. M. C. 78; R. v. Widdop, L. R. 2 C. C. R. 3; 27 L. T. N. S. 693; 42 L. J. M. C. 9, (and see 5 & 6 Vic., c. 39, 24 & 25 Ib., c. 96, s. 85, as to examination of agent guilty of misdemeanor.

[39] R. v. Coote, L. R. 4 P. C. 599; 42 L. J. P. C. 445.

[40] See 1 Hale P. C. 301; R. v. Cliviger, 2 T. R. 263; Cartwright v. Green, 8 Ves. 405; R. v. Bathwick, 2 B. & Ad. 639; R. v. Worcester, 6 M. & S. 194.

[41] Stephen's Ev., art. 120, n.

[42] 2 Stark. Ev. (3d ed.) 551.

[43] 4th ed. 110.

[44] Cartwright v. Green, *ubi supra*.

[45] T. Raym. 2.

[46] O'Connor v. Majoribanks, 4 M. & Gr. 435; Monroe v. Twisleton, Peake, 221.

[47] Griffith's Mar. W. Prop. Acts (4th ed.), 53; see Taylor's Ev. (6th ed.), 810; 16 & 17 Vic., c. 83, s. 3.

[48] 1 Stark. Ev. (3d ed.), 70; 2 Ib. 549; Co. Litt. 6, b; 2 Haw., c. 46; 2 Hale, 279.

[49] Barker v. Dixie, Cas. temp. Hardw. 264.

[50] 45 & 46 Vic., c. 75.

[51] Reported in the August issue of the *Western Jurist*.

a man of unsound mind?' The court had ruled that the confidential communications between husband and wife were protected in the examination. The question was admitted under exception, and the answer was: 'I never did.' This question called for the witness' observation of the defendant's soundness or unsoundness of mind, and the objection goes partly on the ground that, notwithstanding the ruling of the court that confidential communications between the husband and the wife were protected, she may have included, as a part of the basis of her answer, what are understood as communications from her former husband. We think that the exhibition of sanity or insanity is not a communication at all, in the sense of the rule which protects the privacy and confidence of the marriage relation, any more than the height or color, or blindness, or the loss of an arm of one of the parties is a communication. The rule which is supposed to have beed violated, was established in order that the conduct, the voluntary conduct, of married life might rest secure upon a basis of peace and trust, and relates to matters which the parties may elect to disclose or not disclose. It was provided in order that matters should not come to the light, which would not do so at all without a disturbance and disregard of the bond of peace and confidence between the married pair. Therefore it has not been applied to any matter which the husband, for example, has elected to make public, by doing or saying it in the presence of third persons along with his wife; and it can not be applied to that which, whether he will or no, he inevitably exhibits to the world as well as to his wife. Some diseases a husband may conceal, and he may choose whether to reveal them or not. If he should reveal the existence of such a disease to his wife, in the privacy of their relation, she may never disclose that communication, even after the relation between them has ceased. But sanity or insanity are conditions which are not of choice, and when the disease of insanity exists, the exhibition of it is neither a matter of voluntary confidence nor capable of being one of the secrets of the marriage relation. The fact that there are instances of cunning concealment for the time, does not affect the general truth that insanity reveals itself, whether the sufferer will or no, to friends and acquaintances as well as to the wife. In short the law can not regard it or protect it as one of the peculiar confidences of a particular relation. It may be added that it is difficult to perceive, in any view of this subject, how the witness' denial that she had seen indications of insanity can be said to reveal any fact which her husband had communicated to her. If our opinion that sanity or insanity can not be a communication within the meaning of the rule should be wrong, it must be remembered that sanity is a presumption of law, and that the wife would seem to reveal nothing to the world, unless she should say that the existence of insanity in her husband had been communicated to her by his conduct during their connection. We are of opinion that no error was committed in receiving this evidence."

But while, apart from inter-communications, husband and wife are now competent and compellable witnesses against each other in civil, but not, save so far as the law act, 1882, previously cited, in criminal proceedings, has been altered by the Married Women's Property Act;[52] the Law of Evidence Amendment Act, 1869,[53] renders the parties to proceedings instituted in consequence of adultery, and the husbands and wives of such parties competent witnesses; with the proviso that no witness to any proceeding, whether a party or not, is to be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of such adultery. The effect of this statute has already been discussed in a former volume;[54] but, it may be added, that in New York, while husband and wife were rendered competent witnesses in such actions in 1879, the legislature in 1880 thought fit to revert to the original rule, holding them incompetent to establish any fact, except that of marriage. But in general they are deemed competent witnesses for or against each other in civil causes, except with regard to confidential communications and actions of *crim. con.* By the act of May 10, 1867, entitled "An act to enable husband and wife, or either of them, to be a witness for or against each other, or on behalf of any party, in certain cases," it is provided that:

[52] 14 & 15 Vic., c. 99; s. 3; 16 & 17 Ib. c. 83.
[53] 32 & 32 Vic., c. 68, s. 3.
[54] 14 Ir. L. T. 317.

"Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against each other * * * in any action or proceeding for or on account of criminal conversation." And this exception was considered in the notorious Tilton-Beecher case (1875), in reference to the admission of Mr. Tilton as a witness. The defendant claimed that Mr. Tilton was excluded altogether, on the ground that the issue was really the adultery of the wife (Mrs. Tilton), and, therefore, the plaintiff's testimony would be "against" his wife. Among others, the case of Dann v. Kingdom,[55] was cited where the husband was held to be incompetent under the act of 1867, to prove the fact of marriage, in an action of *crim. con.* On the other hand, it was argued for the plaintiff that Mr. Tilton was not called to testify "against" his wife, because she was not a party. In refutation of the authority of Dann v. Kingdom, the case of Petrie v. Howe,[56] decided in the same department, was cited. In the latter case it seems that the husband was allowed to testify in an action of *crim. con.*, without objection either from counsel or court, and the point was neither raised by counsel nor passed upon by the court at general term. The defense also contended that the exclusion of the plaintiff would give the defendant an undue advantage, and if plaintiff was excluded as a witness he could not give his testimony even on general or collateral matters. Judge Neilson decided that the plaintiff was competent to be sworn and to testify in his own behalf; but as to the principal question at issue, he was not competent to testify in respect to any confidential communication.—*Irish Law Times.*

[55] 1 N. Y. Sup. 492.
[56] 4 N. Y. Sup. 85.

BILL OF REVIEW — AGAINST UNITED STATES — SERVICE OF PROCESS.

BUSH v. UNITED STATES,

United States Circuit Court, District of Oregon.

1. A bill of review is a proceeding in the nature of a writ of error, and it may be brought to modify or reverse a decree given in a suit in equity in favor of the United States for errors apparent upon the face thereof.

2. Upon a bill of review to correct a decree given in favor of the United States the subpœna to appear and answer may be served on the district attorney.

3. In an action brought by an informer upon secs. 3490-3 of the Revised Statutes to recover damages and forfeitures for collecting false claims from the treasury, the person who sues represent the United States therein, and also in all suits and proceedings brought or taken in aid of an execution or to enforce the judgment therein, and is entitled to control the same.

Geo. H. Williams, for plaintiffs; *James F. Watson*, for defendant.

DEADY, J., delivered the opinion of the court:

On August 1, 1882, the plaintiffs filed in this court a bill of review to procure, as to them, the modification of a final decree of this court, given in the case No. 356 of the United States v. William C. Griswold and others, including said plaintiffs, and signed and enrolled on August 12, 1881, for error apparent upon the face thereof.

The bill of review states that on January 29, 1880, the amended bill was filed by the United States in the original suit, and sets it forth in full. From this, among other things, it appears that on May 27, 1877, the United States, by B. F. Dowell, informant, brought an action against W. C. Griswold under secs. 3490 and 5438 of the Revised Statutes, to recover certain damages and forfeitures for knowingly collecting from the treasury of the United States, on January 11, 1879, false claims to the amount of $17,000, in which on July 30, 1879, the plaintiff obtained judgment for $35,228 and costs and disbursements amounting to $2,821.60; that said Griswold, at the date of said judgment, was the owner of certain real property situate in Salem. Or, including the west half of lots 1, 2, 3 and 4, of block 73, and lot 8 in block 10, which had been illegally sold and purchased by the plaintiffs herein, upon certain judgments held by them against said Griswold contrary to the priority of the United States, and asked to have said proceedings set aside and the property sold, and the proceeds applied upon the aforesaid judgment of the United States v. Griswold. By the final decree it was provided, so far as the plaintiffs herein are concerned, that the property aforesaid should be sold by the master of this court, and the proceeds applied first, to the satisfaction of the plaintiff's liens thereon, and the remainder, if any, upon the judgment of the United States.

In the bill of review it is alleged that the United States had no right to priority of payment out of this property and, therefore, the decree, so far as it provides for its sale and the disposition of the proceeds, is erroneous.

On August 2d, the subpœna issued upon the bill of review was served on Mr. James F. Watson, the United States District Attorney, together with a copy of the bill and a notice from the plaintiffs, to the effect that the bill had been filed for the purpose, so far as they are concerned, of procuring a reversal of the decree of August 12, 1881, and requiring him "to appear and answer said

bill, on the first Monday in September, 1882, or judgment thereon will be taken for the want of an answer." On September 4, the district attorney filed a motion to dismiss the bill for the reasons following: 1. That the United States "can not be sued herein without its consent," and that it has not nor does not consent "to be made a party herein." 2. No process has or can be served on the United States by which it has been or can be "brought as a defendant into this court." 3. This court neither has nor can acquire "jurisdiction over the United States herein."

The motion to dismiss has been argued by counsel without any question being raised as to this mode of making the objection to the jurisdiction of the court.

It is well understood that the United States can not be sued unless with its own consent, and that it has not given such consent except in a few instances, of which this is not one. United States v. Eckford, 6 Wall. 487. But an auxiliary, or supplemental proceeding against the United States, growing out of an action instituted by it, is not generally considered a suit against the United States in that sense. Therefore a writ of error to reverse a judgment obtained by the United States may be sued out and prosecuted by the defendant therein. The proceeding by this writ, though technically a new action brought to set aside the judgment in the old one, and it may be to recover what was lost by it, is nevertheless regarded from this standpoint, as one in which the United States is not thereby brought into court to answer the claim of the plaintiff in error without its consent, but rather one by which it is continued in court for the purpose of contesting the allegations of court for the purpose of contesting the allegations of error in an action voluntarily instituted there by itself. Now, a bill of review, particularly as in this case, when it is brought for error in law apparent upon the face of the decree, is in the nature of a writ of error. (Story's Equity Pleading, sec. 403, *et seq*). Indeed, the former has the same scope and purpose in a suit in equity that the latter has in an action at law, "to procure an examination and alteration on a reversal of a decree made upon a formal bill" between the same parties. Id. sec. 403. No case has been cited by counsel in which this question has been directly considered. United States v. Atherton, 102 U. S. 372, was a suit to set aside a decree of the District Court of California confirming a claim under the act for the settlement of private land claims in that State. But this decree was given upon a bill of review brought by the grantee of the claimant against the United States four years after the court had by a former and first decree rejected the claim. No question seems to have been made as to the jurisdiction of the district court to give a decree upon a bill of review against the United States; and Mr. Justice Miller, in the consideration of the case, said: "It is not denied by counsel, nor can it well be doubted that the district court had jurisdiction by bill of review to set aside and correct the former decree." In the cases of the United States v. Lemore, 4 How. 226, and Hill v. United States, 9 How. 386, it was held that the defendant in a judgment obtained by the United States could not maintain a suit to enjoin the latter from enforcing the same, upon the ground that the United States could not be sued without its consent. But in the subsequent case of Freeman v. Howe (2d How. 460), it was held that "a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice or an inequitable advantage under *mesne* or final process, is not an original suit but auxiliary and dependent, supplementary merely to the original suit out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties. This statement of the law seems to be in conflict with the ruling in the case of United States v. Lemore, and Hill v. United States, *supra*, for if the court has jurisdiction of such auxiliary suit without reference to the citizenship or residence of the parties, it must be, because having acquired jurisdiction of the subject matter and the parties in the original suit, it does not thereafter lose it because at some subsequent stage of the litigation before it, the exigency of its legal procedure requires the parties to change position as plaintiff and defendant.

And with like reason, if the court acquires jurisdiction in an action in which the United States is plaintiff, it must retain that jurisdiction so long as the litigation may properly be continued before it, according to the usual course of procedure therein. True, the United States is a sovereign and can not be sued in its own courts without its consent; but when it elects to go into court as a suitor, it must submit to the usual course of procedure therein—at least so far as may be necessary to enable the defendant to maintain his rights.

A Bill of Review is an established mode of proceeding in a court of equity by which the defendant may have a decree given against him reviewed for errors upon its face by the court that pronounced it. It is only a more formal mode of rehearing the case, and is an incident of the original suit. When called upon to answer such a bill, the United States is not sued in any proper sense of the term, but only to show why a decree which it has obtained against the plaintiff, that is alleged to be erroneous and unjust, shall not be modified or reversed. My conclusion is, that the plaintiffs may maintain this bill to review the decree against them; and the next question is, how shall the United States be served with the subpœna or notified of the proceeding? Being a body politic, service must be made upon some natural person for it. In the absence of any statute upon the subject, all considerations of fitness and convenience point to the district attorney as the proper person. In Conkling's Treatise, 687, it is stated that in the case of a writ of error against

the United States, the citation must be served upon "the district attorney, for the time being, of the district in which the judgment was rendered." In United States v. Lemore, and Hill v. United States, *supra*, the district attorney appeared and answered, but whether in obedience to a subpœna or notice does not appear. In the English Chancery, in the case of a bill to stay proceedings at law or a cross-bill, if the plaintiff in the action at law or the original bill was "abroad"—beyond the seas—the practice was, upon motion of the plaintiff, to order service of the subpœna to be made upon the attorney for his absent client. 1 Smith's Chancery, 116, 605. And *ex necessitate rei*, the same practice prevails in the national courts when the plaintiff in the action at law or the original bill is a non-resident of the State where the court is held, and can not be served personally therein. Conk. Treat. 181; Segees v. Thomas, 3 Bl. C. C. 15; Kamm v. Stark, 1 Saw. 550, and cases there cited.

But when the United States is the party to be served, it being known that it can not be served personally, at any place, I think the process may be served on its attorney at once, without any previous direction from the court. My conclusion is that the service of the subpœna, to appear and answer, upon the attorney for the United States, is proper and sufficient.

A question was made in the course of the argument as to who is the attorney of the United States in this case. The judgment in the action at law to recover the damages and forfeiture under secs. 3490-3 of the Rev. Stat., is the foundation of this litigation. The action was brought by B. F. Dowel in the name of the United States, as well for himself as it, and at his own expense. The statute authorizing him to bring it gave him the sole control of it, except that he could not dismiss it without the consent of the judge and the district attorney. In effect, this made him that representative of the United States, so far as the litigation is concerned. The subsequent suit in equity to subject certain property of the defendant in that action to the satisfaction of the judgment therein, was an incident of such action. It was brought in the name of the United States, apparently by the district attorney—at least the bill is signed by him, as such, and it is not alleged therein that B. F. Dowell sues for himself and the United States or in anywise. The bill is also signed by Dowell, as solicitor for the United States. Both Dowell and the United States are interested in the judgment obtained in the action at law—one-half the principal and all the costs belonging to the former. He also has the right, I think, to institute and control all proper suits and proceedings in the name of the United States, to enforce such judgment for their joint benefit. His signature to the bill, as solicitor, is an assertion that he is acting as attorney for the United States in the premises; but being there in company with, if not in subordination to that of the district attorney, may be construed to be an admission that he consents to the United States conducting or joining in the conduct of the suit by its ordinary attorney—the attorney for the district of Oregon.

Upon this theory of the case, the United States has two attorneys in the suit, wherein the decree is sought to be reviewed by this bill—the ordinary one and a special one. And it may be that both ought to be served with the subpœna. But as the district attorney must have come into the case with the consent, if not at the solicitation of Dowell, I think he may be considered, for the time being, as the attorney for both Dowell and the United States.

The motion to dismiss is not allowed.

PUBLIC POLICY — AUCTION SALE—COMBINATION.

SMITH v. ULLMAN.

Supreme Court of Maryland, October 22, 1882.

1. There is nothing either in law or morals to prevent parties from uniting together in good faith to purchase property, whether it is offered at public auction, or advertised for sale and bids from purchasers are invited.

2. A prayer can not be properly granted which confines the attention of the jury entirely to the testimony of a single witness, as not specifying how the profits of a transaction between the parties were to be divided, when there was uncontradicted testimony from other witnesses that it was expressly agreed the profits should be shared equally between the parties.

3. Even if the contract had been silent as to the proportion in which the profits were to be divided, the legal presumption would arise that they were to be shared equally.

Appeal from the Superior Court of Baltimore City.

The case is stated in the opinion of the court.

First Exception.—The evidence being closed, the defendant offered the two following prayers:

2. That if the jury believe from the evidence that the said sale was in its nature an auction sale, or a sale where the goods were to be sold to the highest bidder, and that the witness, Noland, as agent for the defendant, did agree with the plaintiffs, that if the plaintiffs would not bid for said goods, that if the said Noland, as agent for the defendant, or the defendant himself bought the goods on the defendant's bid, that the plaintiffs should have one half or any portion of the profits, though they may have believe from the evidence that the said Noland had, as agent of the defendant, his authority to make such agreement, or that after Noland had made the same as agent of the defendant, the defendant ratified the said agreement, their verdict must be for the defendant.

3. That if the jury believe from the evidence that the said sale was in its nature an auction

sale, or a sale where the goods were to be sold to the highest bidder, and that the witness, Noland, as agent of the defendant, did agree with the plaintiffs that the said goods should be bid for and bought in the name of the defendant, with the understanding and agreement between the said Noland and plaintiffs, that the said purchase should, in reality, be made on the joint account of the defendant and plaintiffs; and should further believe that if the said agreement had not been entered into that the plaintiffs would have bid on their own account for said goods, or that the entry into said agreement had a tendency to prevent the said plaintiffs from so bidding, though they may believe from the evidence that the said Noland had, as agent for the defendant, his authority to make such an agreement, or that after Noland had made the same as agent for the defendant, the defendant ratified the agreement, their verdict must be for the defendant.

The court (Gilmore, J.) rejected both prayers, and the defendant excepted.

Second Exception.—The defendant then offered the following prayer:

5. That if the jury believe from the evidence that the witness, Noland, was the agent of the defendant, and as such agent had full authority of the defendant to make the agreement with the plaintiffs, as testified to by the said Noland, yet if they further believe from the evidence that no particular share of the profits was specified and agreed upon that the plaintiffs should have, then the said agreement is void for uncertainty, and their verdict must be for the defendant.

This prayer the court rejected.

The defendant excepted, and the verdict and judgment being against him, he appealed.

BARTOL, C. J., delivered the opinion of the court:

This is a suit brought by the appellees against the appellant.

The material facts of the case, as disclosed by the record, are correctly stated in the appellees' brief as follows: "The appellees were dealers in old iron, doing business in Alexandria, Va. The appellant was a dealer in the same kind of goods at Richmond, Va. Noland was the general agent of appellant for the purchase of goods, was in Alexandria in October, 1879, and received information from the appellees that bids for the purchase of certain materials offered for sale by the United States Government would be opened in New York in a few days. The materials were enumerated in a published list. These goods, the appellees explained, were at Fort Washington, Md., and it was agreed between the appellees and Noland, acting as agent for the appellant, that the goods should be bought on the joint account of the appellant and appellees, and that they should share the profits. The appellees took Noland to Fort Washington, where they inspected the iron proposed to be bid for, then they returned to Alexandria, whence Noland reported the proposed agreement by letter to the appellant, went to Richmond, and in person made the same report to the appellant, who authorized him to return to Alexandria and conclude his agreement with the appellees by sending on his bid, which was done.

Ullman, one of the appellees, wrote out the bid, which Noland suggested should be solely in the name of the appellant, inasmuch as if in the appellees they might have trouble (presumably from certain creditors of the appellees). The bid was sent on signed "J. C. Smith, per Noland," and the goods were awarded upon it. The appellant paid the cash deposit of $746 33, according to the agreement, and resold the goods as they lay at a clear profit of $1,944, the purchaser paying the balance due the Government. The money arising from the resale was retained by the appellant, and the present suit was brought to recover from him their half of the profits, which was awarded by the jury to the appellees.

The only exceptions taken to the ruling of the court below, which are relied on by the appellant, are: 1st. To the rejection of his second and third prayers. and, 2d, to the rejection of his fifth prayer.

The defense to the action presented by the first bill of exceptions is based upon the theory that the contract between the parties, by which they agreed to unite in making a bid for the articles and to share the profits between them was *nudum pactum*, because such contract was against policy and therefore void.

There is no evidence in the case of any corrupt bargain or combination between the parties for the purpose of preventing a fair competition among the bidder, nor of any evil or fraudulent purpose on their part in the transaction; but the object of their uniting was to enable them by joint means to become purchasers of a large amount of merchandize offered in bulk, which one of them acting singly would not have the means to buy. This appears from the testimony of Dreifus, one of the appellees, who said: "We (meaning the appellees) were about to make the bid on that iron ourselves, the only thing I wanted was somebody with me, because the amount was too great for us to handle that amount of iron. It was probably seven or eight thousand dollars, if the whole had to be paid right down; I would have done it probably with somebody else—I wish I had, and I would not have had any trouble."

There is nothing either in law or morals to prevent parties from uniting together in good faith to purchase property, whether it is offered at public auction or as in the present case, advertised for sale and bids from purchasers are invited. In Small v. Jones, 1 Watts & Serg. 129, where there was a purchase of property at sheriff's sale by several lienors who united therein, the bid being made by one of their number, and the sale was impeached as for that reason fraudulent and against public policy. Chief Justice Gibson said: "It is not to be doubted that lien creditors, as well as others, may purchase jointly

at sheriff's sale, if all be open and fair; a combination of interests for that purpose is not necessarily corrupt, and if it be forbidden it must be by some principle of public policy. * * * * It is as we have said the end to be accomplished which makes such a combination lawful or otherwise. If it be to depress the price of the property by artifice, the purchase would be void; if it be to raise the means of payment by contribution or to divide the property for the accommodation of the purchasers, it will be valid," In Pratt v. Oliver, 3 McLean, C. C. 301, it was said by Judge McLean: "To hold that individuals may not associate together for the purpose of purchasing lands of the United States at a public sale, would be a novel doctrine, and contrary to what has been generally practised by purchasers, and that under the sanction of the Government."

In support of the same doctrine we refer to Kearney v. Taylor, 15 How. 494, where the subject was carefully considered. Mr. Justice Nelson, speaking for the court, after referring to several cases, some of which have been cited by appellant, in which it had been held that contracts similar to the one under consideration were against public policy, said, "later cases, however, have qualified this doctrine by taking a more practical view of the subject and principles involved, and have placed it upon ground more advantageous to all persons interested in the property, while at the same time affording all proper protection against combinations to prevent competition;" and on page 420, after discussing the practical effects of several persons uniting together for the purpose of buying property at public sale which it would be beyond the means or ability of a single individual to purchase, remarks, "these observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably to the evil consequences it was intended to avoid. Instead of encouraging competition it would destroy it." The principle decided by the case is that "if upon examination it is found that the object and purpose of the combination are, not to prevent competition but to enable, or as an inducement to, the persons composing it, to participate in the bidding, the sale should be upheld—otherwise, if for the purpose of shutting out competition and depressing the sale, so as to obtain the property at a sacrifice."

These are the sound principles applicable to sales by public auction. If they were held as applicable here, there is nothing in the evidence that would justify us in declaring the contract in the present case void, as against public policy. Without referring to other authorities, we are of opinion that the contract between the parties was valid, and consequently it was not error to refuse the second and third prayers of the appellant contained in the first bill of exceptions.

The second bill of exceptions was taken to the rejection of the appellant's fifth prayer, which was based upon the theory that the contract as testified to by Noland was void for uncertainty, because it did not specify what particular share of the profits the appellee were to have. This prayer could not properly have been granted as it confined the attention of the jury entirely to the testimony of a single witness; whereas, there was uncontradicted testimony from other witnesses that it was expressly agreed the profits should be shared equally between the parties. But even if the contract had been silent as to the proportions in which the profits were to be divided, the legal presumption would arise that they were to be shared equally. In support of this proposition many authorities might be cited. We refer only to Peacock v. Peacock, 16 Sum. Ves. 49, and notes; 3 Kent Com. 29; Story on Partnership, sec. 24; Roach v. Perry, 16 Ill. 37; Donelson v. Posey, 13 Ala. 752.

Finding no error in the ruling of the court below, the judgment will be affirmed.

Judgment affirmed.

COMMON CARRIER—DUTY TO PASSENGER—MASTER AND SERVANT—TRESPASS OF SERVANT.

CHICAGO, ETC. R. CO. v. FLEXMAN.

Supreme Court of Illinois, September Term, 1882.

1. While a person remains on a railway train with the assent of the conductor, the relation of carrier and passenger subsists, notwithstanding no fare is demanded by the conductor and none is paid.

2. A carrier must not only protect his passengers against the violence and insults of strangers and co-passengers, but also against the violence and assaults of his own servants. If this protection is not afforded, and the passenger is assaulted and beaten through the negligence of the carrier's servants, he will be responsible for the injury, and especially for the assault of his servants.

Appeal from the Circuit Court for the Second District, heard in that court on appeal from the Circuit Court of Iroquois County, Judge Franklin Blades presiding.

Wm. Armstrong, for the appellant; *Doyle, Morris & Stearns*, for the appellee.

CRAIG, C. J., delivered the opinion of the court:

This was an action brought by James Flexman, against appellant, to recover damages for personal injuries inflicted upon him while a passenger in appellant's cars, by a brakeman in the employ of the company.

The plaintiff, as appears from the evidence, procured a ticket from Hoopeston to Milford, and took passage on a freight train which carried passengers. Soon after plaintiff entered the car he laid down in a seat and went to sleep. When the

train arrived at Milford he was notified by the conductor. As plaintiff was about to leave the car he missed his watch, and supposed it had been stolen. He then refused to leave the train until he recovered the watch, and the conductor consented that he might remain on the train until they should reach Watseka. After the train had started, a passenger assisted plaintiff in making a partial search for the watch, bnt it was not then found. The passenger then inquired of plaintiff who he thought had the watch, to which he repiied: "That fellow," pointing at the brakeman. Immediately after the remark was made the brakeman struck plaintiff in the face with a railroad lantern, inflicting the injuries complained of. These are substantially the facts, over which there is no controversy by the parties.

After the plaintiff had introduced all his testimony, the defendant entered a motion to exclude the evidence from the jury, and asked for an order directing the jury to find a verdict for defendant. The court denied the motion, and the defendant excepted. This decision of the court presents the question whether the facts proven, conceding them to be true, constitute a cause of action against the defendant.

The point is made that as plaintiff only paid fare to Milford, he ought not to be regarded as a passenger on the train after he left that place. We do not regard this position well taken. The conductor did not demand or require fare from the plaintiff; had he done so, no doubt the required amount would have been paid. As the conductor failed to call for fare, it must be regarded as waived. At all events, we have no hesitation in holding that the railroad company occupied the same position towards plaintiff that it would have occupied had he paid his fare.

But it is said, "that if the plaintiff was injured by a servant of appellant, it was an act outside of the employment of the servant who committed the act, and not in furtherance of his employment by the master." This position is predicated upon McManus v. Cricket, 1 East, 106, and like cases which have followed it. In the case cited, Lord Kenyon said: "It is laid down by Holt, C. J., as a general position, 'that no master is chargeable with the acts of his servant but when he acts in the execution of the authority given him.' Now, when a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and, according to the doctrine of Lord Holt, his master will not be answerable for such act." The doctrine announced is no doubt correct when applied to a proper case. If, for example, a conductor or brakeman in the employ of a railroad company should wilfully or maliciously assault a stranger—a person to whom the railroad company owed no obligation whatever,—the master in such a case would not be liable for the act of the servant; but when the same doctrine is invoked to control a case where an assault has been made by the servant of the company upon a passenger on one of its trains, a different question is presented—one which rests entirely upon a different principle.

What are the obligations and duties of a common carrier toward its passengers? In Keokuk Northern Line Packet Co. v. True, 88 Ill. 608, it was held that a steamboat company, as a carrier of passengers for hire, is, through its officers and servants, bound to the utmost practicable care and diligence to carry its passengers safely to their place of destination, and to use all reasonably practicable care and diligence to maintain among the crew of the boat, including deck hands and roustabouts, such a degree of order and discipline as may be requisite for the safety of its passengers. The same rule that governs a steamboat company must also be applied to a railroad company, as the duties and obligations resting upon the two are the same, or any other company which carries passengers for hire. In Goddard v. Grand Trunk Ry. Co., 57 Me. 202, in discussing this question, the court say: "The carrier's obligation s o carry his passenger sa ely and properly, and to treat him respectfully; and if he entrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. * * * * He must not only protect his passengers against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed—if this protection is not furnished—but, on the contrary, the passenger is assaulted and insulted through the negligence of the carrier's servant, the carrier is necessarily responsible." In Bryant v. Rich, 106 Mass. 180, where the plaintiff, a passenger on a steamboat, was assaulted and injured by the steward and some of the table waiters, the defendant, as a common carrier, was held liable for the injury. In Croaker v. Chicago, etc. R. Co., 36 Wis. 657, where the conductor of a railroad train kissed a female passenger against her will, the court, in an elaborate opinion held the railroad company liable for compensatory damages. It is there said: "We can not think there is a question of the respondent's right to recover against the appellant for a tort which was a breach of the contract of carriage." In Shirley v. Billings, 8 Bush, 147, where a passenger on defendant's boat was assaulted and injured by an officer of the boat, the defendant was held liable. See also McKinley v. Chicago, etc. R. Co., 44 Iowa, 314; New Orleans, etc. R. Co. v. Burke, 52 Miss. 200. Many other authorities holding the same doctrine might be cited, but we do not regard it necessary. It is true there are authorities holding the opposite view, but we do not think they declare the reason or logic of the law, and we are not prepared to follow them.

The appellant was a common carrier of passengers. As such it was not an insurer against any possibly injury that a passenger might re-

ceive while on the train, but the company was bound to furnish a safe track, cars and machinery of the most approved quality, and place the trains in the hands of skilful engineers and competent managers—the agents and servants were bound to be qualified and competent for their several employments. Again, the law required appellant, as a common carrier, to use all reasonable exertion to protect its passengers from insult or injury from fellow passengers who might be on the train, and if the agents of appellant in charge of the train should fail to use reasonable diligence to protect its passengers from injuries from strangers while on board the train, the company would be liable. So, too, the contract which existed between appellant as a common carrier and appellee as a passenger was a guaranty on behalf of the carrier that appellee should be protected against personal injury from the agents or servants of appellant in charge of the train. The company placed these men in charge of the train. It alone had the power of removal, and justice demands that it should be held responsible for their wrongful acts toward passengers while in charge of the train. Any other rule might place the traveling public at the mercy of any reckless employee a railroad company might see fit to employ, and we are not inclined to establish a precedent which will impair the personal security of a passenger.

We are of opinion that the evidence showed a legal cause of action in plaintiff, and the court did not err in overruling the motion to exclude the evidence from the jury. Two instructions given for the plaintiff have been somewhat criticised, but we think they were in the main correct.

The judgment will be affirmed.

BOND OF BANK TELLER — BREACH—ASSIGNED TO OTHER DUTIES BY CASHIER.

DETROIT SAVINGS BANK v. ZEIGLER.

Supreme Court of Michigan, October 11, 1882.

Where the receiving teller of a bank who, during the temporary absence of the general teller, was assigned to his duties by the cashier, embezzled funds of the bank that so came in his hands, it was *held* that his sureties on his bond were liable, though such funds had not come into his hands as receiving teller.

Error to the Superior Court of Detroit.

John H. Bissell and *Otto Kirchner*, for appellant; *John D. Conely*, for appellees.

COOLEY, J., delivered the opinion of the court:

This suit is upon a bond given by defendant, Herman H. Zeigler, as principal, etc., the other defendants as sureties, to secure to the plaintiff the faithful performance of Zeigler's duties as teller. The bond is dated February 10, 1877. The penalty named is $5,000, and the condition is as follows: "The condition of this obligation is such, that whereas the above bounden Herman H. Zeigler has been appointed receiving teller savings department, and by the terms of the by-laws of said bank, is made responsible for all such sums of money, property and funds of every description, as may from time to time be placed in his hands by the cashier, or otherwise come into his possession as receiving teller. Now, therefore, the condition of the foregoing obligation is such that if the said Herman H. Zeigler shall faithfully and honestly discharge the duties of his said office, and shall faithfully apply and account for all such moneys, funds and valuables, and shall deliver the same, on proper demand, to the board of directors of said bank, or to the person or persons authorized to receive the same, then the foregoing obligation shall be void, otherwise to remain in full force and value."

At the time when this bond was given and Herman Zeigler entered upon the performance of his duties, his brother, Charles Ziegler, was the general teller of the bank. As such he had charge of commercial deposits and payments, and was also the superior of Herman Zeigler, whose duty it was to account to him at the close of each business day for the money received in the savings department for that day. It seems to have been customary in the bank, if for any reason the general teller was temporarily absent, for the receiving teller of the savings department to take his place while his absence continued, and the cashier of the bank testified that he directed this, and understood it to be the duty of the receiving teller of the savings department to comply with the direction. Such temporary absences occurred while Herman Zeigler was such receiving teller, and he took his brother's place while they continued. The case shows that of the moneys which came to his hands while thus temporarily acting for his brother, he embezzled a sum larger than the penalty bond. His brother was privy to the embezzlement.

1. This suit is in *assumpsit;* and it is objected that *assumpsit* will not lie. That at the common law the action must have been debt, is conceded; but the statute provides that "in all cases arising upon contracts under seal, or upon judgments, when an action of covenant or debt may be maintained, an action of *assumpsit* may be brought and maintained in the same manner in all respects as upon contracts without seal." Comp. Laws, sec. 6194. Counsel for the defense make an ingenious argument to convince us that this statute is not applicable to a penal bond without covenants. We do not agree in this. We think the intent of the statute is made plain in its words: to permit the action of *assumpsit* to be brought "in all cases" where before an action of debt might be brought on a contract under seal. This is such a contract and such a case.

2. The second objection to a recovery is more specious, and goes to the merits. It is that there has been no breach of the bond. The moneys for

which Herman Zeigler failed to account did not, it is said, come to his hands as receiving teller of the savings department of the bank, or in the performance of his duties as such; but they came to his hands while he was temporarily performing the duties of another office. But this bond is not conditioned that he shall faithfully perform the duties of any other office, or account for moneys that might come to his hands by virtue of any other trust; and his sureties can not be supposed to have contemplated when they undertook to be responsible for his conduct as receiving teller of the savings department, that they were making themselves responsible for his conduct in some other position, to which he might be assigned, and of which the duties might be different and the responsibilities greater. This, in short, is the argument for the defense.

Abstractly considered, this argument is undeniable. The sureties upon an official bond undertake for nothing which is not within the letter of their contract. The obligation is *strictissimi juris*; and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent. Paw Paw v. Eggleston, 25 Mich. 36, 40; Detroit v. Leadbeater, 29 Mich. 24; Johnston v. Kimball, 39 Mich. 137; Bullock v. Taylor, Id. 187; United States v. Boyd, 15 Pet. 187; State v. Cutting, 2 Ohio, 1; McCluskey v. Cromwell, 11 N. Y. 593; Weonston v. State, 78 Ind. 175. This is familiar law, and rests on sound reason. But has this law any application to the facts of this case? The judge of the Superior Court thought it had, and turned the case out of court. We are not satisfied he was correct in this.

The bank, it appears, was one which had two departments; a savings department, and a commercial department. It had for both one cashier and one general teller; and the money does not appear to have been kept separate, but was brought daily into a common fund. The receiving teller was subordinate to the general teller, as well as to the cashier. The exact duties of the receiving teller of the savings department do not seem to have been particularly defined, except as the designation of the office would define them, or as they would be indicated by the condition of the bond. He was to be responsible for all such sums of money, property and funds as the cashier might place in his hands as such teller, and also for all such other money, property and funds as might otherwise come into his hands as such teller. His duty was to account faithfully for all these. When the teller should stand at his desk and receive savings deposits, he would of course receive them as receiving teller; and it might also be said that he would receive them because they were placed in his hands by the cashier, who, as chief financial officer of the bank, had placed him at that post. But if the defense is correct in the view taken of this officer's duties, it is not very manifest that the cashier could have had any occasion to intrust him with moneys otherwise. He simply received what was paid in, and handed it over to the general teller. What occasion could have arisen for putting other moneys into his hands as receiving teller merely?

But we think this view is too restricted and narrow. Every such appointment is made with the general course of business in such institutions in mind, and it must contemplate that what is customary will take place. If it is customary for one officer to assist another when the need arises, we must assume that he expected to render such assistance, and that by implication he undertook to do so as a part of his official duty. And if he was bound to have this understanding of his undertaking and his duty, his sureties were bound to have the like understanding. The number of officers of a bank will vary with the extent of the business and with its needs. There may be only a president and cashier, but there will commonly be a teller, and there may also be a vice-president, assistant cashier, one or more assistant tellers, and such number of book-keepers, messengers and other assistants as the business may require. When a cashier and a teller are sufficient for all the ordinary needs of the bank, is a cashier performing an official act when, in the temporary absence of the teller, he steps to the teller's place and receives a deposit? Or is the teller acting outside his duty when, under corresponding circumstances, at the cashier's request, he answers the ordinary calls at the cashier's table? We think not. We think any such interchange of assistance as temporary need may require, is fairly within the contemplation of any appointment to such a place of the undertaking in accepting it, and of any official bond that might be given by the appointee. If this were not so, every officer in a bank would require an assistant, or the business of the bank would come to a stop whenever temporary illness or any necessity whatever should, for any time however short, take him from his desk. We agree entirely with the defense that it is not legally competent to impose new duties upon an officer to the prejudice of his sureties, but we do not think such a temporary assignment is a case of that nature. The officer is merely giving the temporary aid which must have been contemplated in his employment; and if he were to refuse to give it when having no better reason than that he did not consider it a part of his business, he would have been likely to be regarded by his superiors as altogether too unaccommodating for their purposes. It would not be too much to expect a dismissal under such circumstances.

We need not say whether a dismissal would be strictly justifiable, for we do not think the needs of this case require a decision upon that point. It is enough in this case to note that Hermann Zeigler did not refuse. As receiving teller of the savings department he was called upon to take the place of the general teller temporarily, and he took it and received moneys which he embezzled. The moneys were confided to him by

the cashier, because of his being such receiving teller, and because in the opinion of the cashier, which Zeigler himself did not contest, it was proper that he should receive them under the circumstances. They therefore came to his hands, because of his office and under circumstances justifying their being confided to him as such. The cases of Minor v. Mechanics' Bank, 1 Pet. 46; Rochester City Bank v. Elwood, 21 N. Y. 88; and German-American Bank v. Auth, 87 Pa. St. 419, are in point.

The judgment must be reversed with costs and a new trial ordered.

The other justices concurred.

WEEKLY DIGEST OF RECENT CASES.

1. APPEAL — APPELLATE PRACTICE — AGREEMENT TO EXTEND TIME.

Appeal from an order appointing a receiver The parties agreed that the appeal might be taken within twenty days from the date of the order, and the transcript was filed within that time, but not within the ten days allowed by law taking appeals in such cases. It is not competent for the parties to a case to extend by agreement the time within which an appeal may be taken to this court. But aside from this the bill of exceptions was not filed within the time allowed for that purpose. The bill was signed by the judge, but was not filed within the time given. It was filed within the term at which the order was made, and as a rule a bill so filed will be presumed to have been filed within the time allowed, but this presumption can not be indulged when the record affirmatively shows what time was granted and does not show a further extension. The appeal is dismissed. *Flory v. Wilson*, S. C. Ind., October 25, 1882.

2. CONTRACT—ENTRY OF LAND—PAYMENT OF TAXES.

A firm of bankers agreed with a man to enter land which they would sell him "at $1.35 per acre any time within six months, or $1.50 per acre within one year." Soon after they paid the annual taxes on the lands, and when they came to sell they added the amount to the agreed price. The purchaser paid it under protest, and afterwards sued to recover it back. *Held*, that as the firm were entitled to keep their title or their security good by paying the taxes and were not bound to determine the legality thereof at their own risk, they could maintain an equitable action for the amount so paid, even though the contract purchaser had not agreed to repay it. Where a party sues for the repayment of money paid under protest, and the defendant claims the money under color of right, as having been paid out by him for plaintiff's benefit, the plaintiff has the burden of proving that defendant has no right to it; and if he does not do so the question of the admissibility of the receipt taken by defendant, in proof of his payment, becomes immaterial. *Congdon v. Preston*, S. C. Mich., October 11, 1882; 13 N. W. Rep., 516.

3. CRIMINAL LAW—ALIBI—RAPE—INSTRUCTIONS.

On a trial for "assault with intent to commit rape," where the defense was an *alibi*, an instruction by the court to the jury that "it is recognized in the law that the defense of *alibi* is one easily manufactured, and jurors are generally and properly advised by the courts to scan the proofs of an *alibi* with care and caution," when in another part of the instructions the jury were advised that a charge of this crime was one easily made, hard to prove, but still harder to be defended, even by the innocent, and they "should not suffer their indignant feelings to control or influence their judgment when considering such cases, but they should bring to the consideration of the evidence in the case their cool, deliberate, dispassionate judgment alone," was *held* not to be error. *State v. Blunt*, S. C. Iowa, October 5, 1882; 13 N. W. Rep., 427.

4. CRIMINAL LAW — EVIDENCE OF ACCOMPLICE — CORROBORATION.

1. A conviction can not be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and where there are no corroborating circumstances it is the duty of the court, as a matter of law, to instruct the jury to acquit. 2. The evidence of an accomplice, standing alone, is not entitled to any weight and should not be considered by the jury. 3. Evidence tending to support the statements of an accomplice, is competent and should be permitted to go to the jury. 4. Before a jury can consider the evidence of an accomplice, as a factor in the problem of guilt or innocence, they must first determine that the other evidence heard proved the existence of corroborative facts. *Craft v. Commonwealth*, Ky. Ct. App., September 12, 1882, 4 Ky. L. Rep., 182.

5. CRIMINAL LAW—EVIDENCE—RESISTING OFFICER.

In action against defendant charged with wounding a peace officer, while attempting to make an arrest without a warrant, and upon information that a felony had been committed by the parties sought to be arrested, it is competent to prove the declarations of persons present at the time of the arrest and indicating the persons supposed to be guilty, in order to show that the officer had reasonable grounds to believe that a felony had been committed. *Werner v. Commonwealth*, Ky. Ct. App., September 26, 1882, 4 Ky. L. Rep., 203.

6. CRIMINAL LAW—PERJURY—DELIBERATION.

Where one cautioned beforehand on a point to which he knew he was called as a witness, notwithstanding the caution, persists in the oath, there is such deliberation about it that it can not be said that the jury did not have sufficient evidence that he swore deliberately to a statement absolutely false; it being sufficiently shown that the facts sworn to did not exist. *Knight v. State*, S. C. Ga., October 17, 1882.

7. CRIMINAL LAW—WHAT AMOUNTS TO BURGLARY.

If two men conspire to open a window and enter a sorte, and one opens it in part, and leaves it thus,

standing a short distance off, and the other hoists the sash high enough to enter, and does enter except his lower limbs, and then is seized, and if it be done with intent to commit a larceny, both would be guilty of burglary. *Cooper v. State*, S. C. Ga., October 17, 1882.

8. DAMAGES — BREACH OF CONTRACT — LIQUIDATED DAMAGES.
Where A sells B his stock of goods, good-will, etc., in a certain business, and agrees not to carry on a similar business in a certain city and for a certain time, stipulating that in the event of a breach of his contract he will pay to B $2.000, which is to be "liquidated damages:" *Held*, that on a breach of the covenant B can recover the sum stipulated as liquidated damages. *Newman v. Wolfson*, S. C. Ga., October 17, 1882.

9. DESCENTS AND DISTRIBUTIONS — "NEXT OF KIN."
The phrase "next of kin" includes such persons as are entitled to inherit the personal estate of a deceased person. Under our statute of descent and distribution, a husband does not inherit his wife's personal estate, and is therefore not the next of kin. *Warren v. Engelhart*, S. C. Neb., October 3, 1882, 13 N. W. R., 401.

10. DIVORCE — ALIMONY TO THE PARTY IN FAULT.
Alimony is rarely and only under peculiar circumstances granted to the party in fault in a divorce suit, even when the party is the wife; and in this case, under the facts developed by the evidence, the allowance of alimony to the husband was improper, although an attorney's fee of $25 might have been allowed; but such fee will not be made a lien upon the homestead of the wife. *Barnes v. Barnes*, S. C. Iowa, October 5, 1882, 13 N. W. R., 441.

11. DIVORCE — CONDONATION.
In a divorce suit, if a husband is shown to have been guilty of such inhuman treatment that the life of his wife was in danger, it is no ground for a new trial that her relatives actively interested themselves in procuring and aiding the divorce proceedings. The fact that the wife lived with and "cooked and washed" for the husband until the decree was rendered, should not be considered as condonation. *Harnett v. Harnett*, S. C. Iowa, Oct. 3, 1882; 13 N. W. Rep., 408.

12. DIVORCE — MOTION FOR ALIMONY — QUESTION AT ISSUE.
The inquiry in applications for alimony is, what is the husband's ability to support his wife, as she had been accustomed to live with him; the merits of the libel for divorce are not then to be passed upon. It was error to hear testimony on the part of defendant in error on the question of the husband's pecuniary condition, and refuse to hear evidence on the same question from the other side. *Jenkins v. Jenkins*, S. C. Ga., Oct. 17, 1882.

13. EQUITY — JURISDICTION — ACCOUNT — PART OF PROFITS AS COMPENSATION FOR EMPLOYEE.
Where an employee of a firm is to receive a certain sum per year, and one-half of the net profits of a certain branch of the business, as compensation for his services, a court of chancery will have jurisdiction of a bill by such employee for an account of the partnership, for the purpose of ascertaining the profits of such business, although the complainant is not a partner. *Channon v. Stewart*, S. C. Ill., September Term, 1882; Reporter's Advance Sheets, 103 Ill., 541.

14. EQUITY JURISDICTION — INJUNCTION TO RESTRAIN NUISANCE — ULTRA VIRES.
The information alleges that the defendants were doing and contemplating acts that if carried out were not only *ultra vires*, but would result in a public nuisance, to-wit: They were digging a well into which to drain the water from a pond, the effect of which would be by lowering the water of said pond, to impair its usefulness for fishing and boating, and to have exposed decaying vegetation, slime and mud, to the detriment of the public health. The defendants demurred to the information on the ground of a want of equity jurisdiction, and on other grounds. Demurrer overruled. *Attorney General v. Jamaica Pond Aqueduct Corporation*, S. Jud. Ct. Mass., Sept., 1882; 1 Am. L. Mag., 308.

15. EVIDENCE — ACCOUNT BOOKS — LUMPING CHARGE.
1. A lumping charge in a book of original entries is not competent evidence. 2. The charges, to be admissible, should be sufficiently specific and itemized to enable the correctness of the charges to be tested. *Corr v. Sellers*, S. C. Pa., Oct. 2, 1882; 39 Leg. Int., 374.

16. EVIDENCE — INDECENT ASSAULT — CHARACTER OF PLAINTIFF.
A sued B for an indecent assault, laying her damages at $5,000. Her bodily injuries were trifling. *Held*, that the *gravamen* of her charge was the mental and moral outrage. *Held, further*, that evidence was properly admitted, showing her to be unchaste in character, conduct and reputation. *Mitchell v. Work*, S. C. R. I., March Term, 1882, R. I. Index, 22.

17. FRAUD — REPRESENTATIONS AS TO ONE'S CREDIT.
Trespass on the case can not be sustained for fraudulent representations as to one's pecuniary circumstances; as when the defendant obtained goods by representing that he had a contract to deliver wood on the railroad; that it was to be paid for soon; that the avails should be given to the plaintiff, when he had already promised, and afterward assigned the same to another party. *Best v. Smith*, S. C. Vt., 1882, Reporter's Advance Sheets.

18. GUARDIAN AND WARD — LENDING WARD'S FUNDS ON PERSONAL SECURITY — APPEAL.
1. A guardian, if he acts with due care, prudence, diligence and good faith in loaning the funds of his ward, is not liable for a loss caused by the bankruptcy of his borrower, although he takes only his note, without other security; and this is so, although he loans money of his own to the same party, and receives but one note running to himself, not as guardian, as evidence of both debts. 2. Distinction between permanent loans for income, and temporary loans of current funds in small sums. 3. The guardian is allowed his expenses of appeal. *Barney v. Parsons*, S. C. Vt., 1882. Reporter's Advance Sheets.

19. HUSBAND AND WIFE — BOND OF — LIABILITY OF HUSBAND.
A husband who executes the bond accompanying the mortgage of his wife to a building association, is liable on such bond, although he received none of the consideration, and although his wife is not liable on the mortgage by reason of her disability incident to coverture. *Wiggins Appeal*, S. C. Pa., October 2, 1882, 13 Pittsb. L. J., 92.

20. HUSBAND AND WIFE — GROUNDS FOR SEPARATE MAINTENANCE.
Where a wife, after making several groundless charges against her husband, and subjecting him

to vexatious suits for divorce, and after having lived away from her husband for a long time, suddenly returns to his house, and without retracting any charges which she formerly made, or expressing a desire to live with him, as his wife, in peace and harmony, demands the right to remain and is refused, she can not make such refusal, under the circumstances, the basis of a proceeding for separate maintenance. *Jenkins v. Jenkins*, S. C. Ill., September 27, 1882, 15 Chi. L. N. 49.

21. HUSBAND AND WIFE—JOINT SUIT.

A husband and wife sued jointly upon a promise to pay them jointly for services performed by them jointly. *Held*, that they were rightly joined as plaintiffs. *Hopkins v. Angell*, S. C. R. I., June 17, 1882, R. I. Index, 67.

22. HUSBAND AND WIFE — SEPARATE ESTATE — WORDS TO CREATE.

1. Where property is bequeathed to a married woman, it is necessary, in order to exclude the marital rights of the husband, that an intention on the part of the testator to vest in her a separate estate should appear so clearly as to be beyond the reach of reasonable doubt. 2. It is not necessary that the words "sole and separate estate" should be used for that purpose; but in the absence of words of equivalent import, or provisions that exclude the marital rights of the husband, or give the wife powers concerning the property inconsistent with the disabilities of coverture, the rights of the husband will attach. *Vail v. Vail*, S. C. Errrors Conn., 1882; 14 Rep., 489.

23. MASTER AND SERVANT—SERVANT'S TORT—MASTER'S LIABILITY.

The act of an employee of a railroad company, in removing a trespasser from a train, can not be considered the act of the company, unless he was employed generally to remove trespassers, or specifically to remove the particular trespasser. An employer is liable for the torts of an employee only where they are committed in the course of his employment; but an employer is not liable for a wilful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve his employer by the wilful act. Where the employee is not acting in the course of his employment, the employer is not liable even for the employee's negligence, and the mere purpose of the employee to serve his employer has no tendency to bring the act within the course of his employment. *Marion v. Chicago, etc. R. Co.*, S. C. Iowa, Oct. 4, 1882; 13 N. W. Rep., 415.

24. MASTER AND SERVANT—WHO IS A FELLOW SERVANT.

A boy about seventeen years old was employed as brakeman by the engineer of an ore train. The engineer had power to employ and discharge brakemen, and the boy was capable and experienced in the business. The engineer directed the fireman to back the locomotive upon a side track to the train, and told the brakeman to attend a switch. He himself went to attend another switch further on. While this was being done, the bell and whistle of a train on the main track near by were both sounding. The first switch was passed and the engineer was about throwing the second when he heard an outcry and saw the brakeman under the locomotive. The brakeman died in a few minutes of his injuries, and his administrator sued the railroad company for the injury. It was proved that the brakeman knew the train was about moving back and that there was room enough for him to perform his duties. *Held*, that he needed no further warning of his danger, and that the accident was due to his own negligence; *also*, that if the failure to sound the bell and whistle of the locomotive was negligence, it was the fault of the fireman who was a fellow-servant of the brakeman, and for whose negligence towards a fellow-servant the company would not be liable. *Greenwald v. Marquette, etc. R. Co.*, S. C. Mich., Oct. 11, 1882; 13 N. W. R. 513.

25. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — ALIGHTING FROM STREET CAR.

The court can not rule that when a street car had stopped or was about to stop at the signal of an alighting passenger, another passenger who wished to alight at the same time was guilty of negligence as a matter of law in not giving notice of his wish. When such other passenger, in alighting while the car was stopped or about stopping, was injured by a fall caused by the acceleration of the car's movement; *Held*, that the question of his contributory negligence was rightly left to the jury. *Rathbone v. Union Ry. Co.*, S. C. R. I., July 7, 1882; R. I. Index, 98.

26. NEGOTIABLE PAPER—PAROL EVIDENCE TO EXPLAIN INDORSEMENT.

Parol evidence is admissible to prove, when one, who is not a party to the note, although the owner, indorses his name in blank, that it was agreed that he was not to be liable unless the purchaser should return the note on his failure to collect it at maturity. *Brewer v. Woodward*, S. C. Vt., 1882; Reporter's Advance Sheets.

27. NEGOTIABLE PAPER—UNCERTAINTY.

A promissory note omitted to state the amount in writing, simply being for blank dollars, but stated at its head $200 in figures. *Held*, that the figures in the margin were no part of the instrument; were a mere memorandum; and could not supply the blank left for insertion of the amount the maker agreed to pay; and there could be no recovery on such a note. *Hollen v. Davis*, S. C. Iowa, October 5, 1882. 13 N. W. Rep., 413.

28. SALE—BILLS OF LADING WITH DRAFT ATTACHED —CONSTRUCTION OF CONTRACT.

Where property is sold and bills of lading are received, which, being attached to a draft for the price, are negotiated, the question whether the consignee is entitled to the bills upon acceptance of the draft, will depend upon the intention of the parties to sell on credit or not. If the sale was on credit, the consignee is entitled to the bills, but not so if the sale was not on credit. *Security Bank v. Luttgren*, S. C. Minn., August, 1882, 14 Rep., 498.

29. USURY—VOLUNTARY PAYMENT.

The payment of a promissory note, governed by the law merchant, to an innocent indorsee is not a voluntary payment, and usurious interest included in such payment may be recovered of the payee of the note. And this is true where such note was given in renewal of prior notes bearing usurious interest, if the usurious interest was carried forward and embraced in the last note. Such note is tainted with the accumulated usury of the entire series, and if, by a transfer of that note to an innocent indorsee, the maker is deprived of his right of recoupment, he may recover of the original payee the sum in usury which he has been compelled to pay. Where a payment is made upon such note, the holder can not apply it to the

usurious interest and thus bring it within the rule of voluntary payments. *Brown v. Lacy*, S. C. Ind., Oct. 24, 1882.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

42. 1st. The statutes of Kansas, sec. 8, ch. 33, Gen. Stats. A. D. 1868, provide, viz.: One-half in value of all real estate in which husband had interest during marriage, and which had not been sold on execution, and not necessary for payment of debts, and of which wife has made no conveyance, shall be set off to her under direction of probate court, etc. 2d. Dower and curtesy are abolished by sec. 28, ch. 33 same statute, but husband and wife each have the same right in deceased partner's estate, *i.e.*, the rose will smell as sweet by any other name. 3d. A owned land, conveyed part to B; wife did not join in deed to B, but subsequently conveyed, by ordinary deed, the same land to C, and C conveyed to B. 4th. A conveyed part land to D; wife did not join, but subsequently conveyed to D by ordinary deed. 5th. Subsequently A died. Wife claims dower in entire tract. 6th. Her attorney theorizes as follows: 1st. Dower exists in fact, as treated in text-works, and that this estate has all incidents of it. 2d. That the conveyance above referred to by wife to cut out dower, must be (1), made in connection with husband; (2), if not so made, contain apt words to release dower, and that an ordinary separate deed before death does not bar dower. —— "KANSAS."

43. B contracts to furnish materials and construct the buildings on a certain fair ground owned by a corporation. B is to receive $12,000 for the material and labor, $1,000 of which is to be in stock of the company at par. On the 1st of each month the architect is to make an estimate of the materials furnished and labor done, and the company agrees to pay B ninety per cent. of these estimates within three days after the completion of the estimates. The company has failed to pay any of these estimates on time—the last one is six weeks past due. The company has offered to give B certificates of stock. B refuses to accept. The company elected B a director, but B refuses to qualify and has never met with the shareholders as a shareholder, but has given verbal permission to a stockholder to vote his shares. 1. Can B now rescind the contract and collect for labor done? 2. Can the company compel B to accept the twenty shares before they are paid up, and then assess him on them? 3. If B fulfils his part of the contract, notwithstanding the laches of the company, can he avoid taking the shares, and file lien for full amount due and unpaid? W. & W.
Topeka, Kan.

44. Is a railroad company bound to carry a passenger the reverse way on a ticket; for instance if I hold a ticket from A to B, and I get on the train at B to go to A, and offer this ticket for my passage, and the conductor refuses to accept it, and denounces me as a fraud, and stops the train and forces me off, is the company liable for damages. J. T. A.

RECENT LEGAL LITERATURE.

SCHOULER'S DOMESTIC RELATIONS. A Treatise on the Law of Domestic Relations; Embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant. By James Schouler. Third Edition. Boston, 1882: Little, Brown & Co.

This work, the first edition of which was printed in 1870, has, in spite of one or two inconsiderable blemishes, steadily won its way in professional favor, until it is as "familiar in their mouths as household words," and deservedly ranks as almost a standard treatise. It has the quality, which is unique among modern law books, of being at once practical and elementary, calculated to mete the needs of both the busy lawyer, who needs only a direction to the authorities, and of the student, who seeks to acquire the principles of the legal science. It will be readily perceived from the topics treated, that the matter must have been considerably condensed in order to come within the boards of a seven-hundred page volume. And this is specially true of the subjects of Husband and Wife and Infancy. This condensation has been faithfully done by actual compression, rather than by the excision of important matter, and it consequently follows that one of the chief excellencies of the work is that it treats systematically and thoroughly, although briefly, a wider range of topics than any other work upon cognate subjects.

The mechanical labor of reference to the volume is considerably facilitated by the adoption of section headings set in bold-faced type, which is an innovation upon the typography of the former edition, and a valuable one.

MODERN JURY TRIALS. Modern Jury Trials and Advocates, Containing Condensed Cases, with Sketches and Speeches of American Advocates; The Art of Winning Cases and Manner of Counsel Described, with Notes and Rules of Practice. By J. W. Donovan. New York, 1882: Banks & Brothers.

This volume treats of the oratorical aspect of jury trials, and can not, therefore, be with strictness called a law-book. For although oratory is an embellishment to the accomplished lawyer, and a valuable addition to his arsenal, it can not in any sense be said to be a necessity to him. There are many good lawyers, some of them of the class called jury lawyers, who are guiltless of the faintest impregnation of that divine afflatus, which is the gift of the gods to the orator, no less than to the poet. And yet it can not be said of the orator as of the poet: "*Nascitur non fit.*" For while no one can "make," *i. e.*, teach an orator, he may, and frequently does, to great extent, teach himself. It is inseparable from the oratorical temperament, that its fortunate possessor should be quick to take a hint, to learn from the experience and methods of others.

The proper hints may assist in the development of many an embryonic orator who, without them, would never have attained his growth at all. The present volume seems to us to abound in such hints, which are principally to be drawn, however, from the abundant extracts from famous arguments of eminent American advocates, and we have no hesitation in commending it to the younger members of the bar who are ambitious to possess the faculty of swaying the minds of the triers of the facts.

NOTES.

——The *Insurance Journal*, in giving a summary of the results of recent English vital statistics, says that the health of the members of the professional class, as it is indicated by the value of its life, varies to a degree that could hardly be expected in its different members. The barristers and the established clergy and dissenting ministers are the healthiest, and are the freest of all from the diseases which kill in early periods of life. After them come the civil engineers, who present a very favorable return. These three representatives of the professional body are, indeed, at the top of the scale of vitality. Their work, arduous as it may be, is not work that kills. Of the barristers, 63 only die to 100 of other professions and trades or industries; of the clergy, 71 to the 100; and of the civil engineers, 86. When we turn, however, to certain other of the professional classes, we find a much less favorable condition of affairs. Solicitors and schoolmasters have a rate of mortality two above the mean; Roman Catholic priests, three above; physicians and surgeons, six above; chemists and druggists (who are now ranked amongst the professions in the statistical records), ten above; and veterinary surgeons, thirteen above. The figures give the range of mortality amongst the professional classes from the extreme highest to the extreme lowest. Taking 100 as the standard, the range is from 63 lowest to 113 highest. It would seem from this that court business is more favorable than office business in English experience. We wonder if the same rule is applicable where the atmosphere of the court rooms is such as is enjoyed in some of our courts.—*N. Y. Daily Register.*

——A railroad company had been terribly beset and hindered by injunction suits, and one was on trial in which it was alleged that they had forfeited their charter by not having completed certain work within a reasonable time. Their attorney was arguing that no great work was ever completed in a short space of time, when he was interrupted by the counsel on the other side, who exultingly referred him to the creation of the world in six days. "Yes," said the attorney, "God did create the world in six days; but supposing the devil had been there filing injunction suits, one after another; when would he have got through then?"

——A rural magistrate in France is sitting in judgment upon the petty offenders of his bailiwick. "What is this case? The old woman is charged with stealing carrots, eh? I fine you one franc. Next case." The next case is called. "Ha! Well, old woman, you are charged with stealing carrots. Guilty, eh? I fine you one franc." And so on, down a monotonous list, until presently the magistrate loses his temper and yells: "Now, then, you old woman, you! Up for stealing carrots, eh? I'll put a stop to this! I fine you 1,000 francs and send you to jail for three years. This thing has got to be stopped!"

——The false confession of crimes which the party has not committed, has become so frequent of late that it becomes a question whether and how far the law ought to interfere to punish so mean an act. It seems clear that it is not an indictable offense, but it is suggested, although we can discover no authority for the position, that an action would lie to recover the expenses of a prosecution so caused; an action, however, which, from the poverty of the delinquents, would, in most cases, be merely throwing good money after bad. Perhaps the only remedy to be found is that which is always applied by the unwillingness of all English courts to give credence to a confession; unlike the professors of the civil law, who have "attributed a peculiar value to the confessions of parties," which they pronounced a "species of proof of so clear, excellent and transcendent a nature as to admit of no proof to the contrary." Best on Evidence, 697. It is abundantly clear, however, that in all times and countries false confessions have been very prevalent; and there are even a few instances on record of persons having submitted to capital punishment itself rather than retract their confessions. The latest instance in this country appears to be "the celebrated case of Joan Parry and her two sons, who were executed in the seventeenth century for the murder of a man named Harrison, who reappeared some time afterwards." Ib., p. 705. False confessions of desertion from the army are so common that a special section of the Mutiny Acts, which reappears in the Army Act, 1881, s. 26, has long been passed for their punishment. — *Solicitors' Journal.*

——As to the correctors of the press, it seems to me that their influence can not have been otherwise than for good upon written language. For myself, I have owed so much to the intelligence, the carefulness, and the good nature of proof-readers, they have so often saved me from the consequences of haste and human imperfection, and I have found them generally so capable of their work, and so faithful and willing and patient in the doing of it, that I feel as if I ought gladly to acknowledge them as fellow craftsmen, to whom it becomes me to be grateful and respectful.—*Richard Grant White.*